STATE OF MICHIGAN
IN THE SUPREME COURT

In re Request for Advisory Opinion
Regarding Constitutionality of 2011 PA 38

Docket No. 143157

Supplemental Brief of Amici Curiae

Michigan State Employee Retirees Association Coordinating Council,

Michigan Federation of Chapters of National Active and Retired Federal Employees Association,

and

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INTRODUCTION

Amici curiae submitted their amicus brief on August 9, 2011, before the Attorney General filed his brief[1] arguing in favor of the constitutionality of 2011 PA 38. Although amici attempted to anticipate the Attorney General's major arguments, they were not entirely successful. Therefore, amici curiae submit this supplemental brief to address the unanticipated major arguments submitted by the Attorney General.

ARGUMENT

1. Incorporation by Reference in Const 1963, art 9, § 24

The first unanticipated argument[2] in the Bursch Brief is that any permanent tax exemption must expressly appear in the Constitution to be valid and, since the public pension tax exemptions do not appear in Const 1963, art 9, § 24, they are prohibited by Const 1963, art 9, § 2.[3]

Amici's response is that the public pension tax exemptions for public employees, schoolteachers, legislators, city library employees, and judges[4] *do expressly appear in the Constitution by operation of law* because they are incorporated by reference into Const 1963, art 9, § 24.

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[1] We refer to the Attorney General brief signed by Solicitor General John Bursch (dated August 10, 2011) as the "Bursch Brief." We refer to amici curiae's original brief dated August 9, 2011, as the "Amicus Brief."

[2] Bursch Brief, pp 18-22.

[3] Const 1963, at 9, § 2: "The power of taxation shall never be surrendered, suspended or contracted away."

[4] MCL 38.40 and MCL 38.69 (state employees), MCL 38.1346 (public school employees), MCL 38.1057 (legislators), MCL 38.705 (city library employees), and MCL 38.2670 (judges).

Incorporation by reference is

> [t]he method of making one document of any kind become a part of another separate document by referring to the former in the latter, and declaring that the former shall be taken and considered as a part of the latter *the same as if it were fully set out therein*. [Black's Law Dictionary, 6th Ed, West Publishing Co, 1990, pp 766-767 (emphasis added).]

See, also, *Interstate Consolidated Street Ry Co v Massachusetts*, 207 US 79, 84; 28 S Ct 26; 52 L Ed 111 (1907):

> If the charter, instead of writing out the requirements of [the incorporated law], referred specifically to another document expressing them, and purported to incorporate it, of course, the charter would have the same effect *as if it itself contained the words*. [Emphasis added.]

The text of Const 1963, art 9, § 24, references "each pension plan and retirement system of the state and its political subdivisions" and makes the "accrued financial benefits" of each such plan and system a constitutional "contractual obligation." Of course, the printed text of art 9, § 24, does not contain any details of any public retirement plan. The only way to determine precisely what "accrued financial benefits" are constitutionally guaranteed is to read the original documents that create "each pension plan and retirement system of the state and its political subdivisions." Thus, Const 1963, art 9, § 24, creates a constitutional contract expressly based on other enactments and documents—such as statutes (like the SERA[5]), collective bargaining agreements, local ordinances, etc.—that are incorporated by reference into the Constitution.

The principal of incorporation by reference is well recognized. *City of Pleasant Ridge v Governor*, 382 Mich 225, 244-252; 169 NW2d 625 (1969). For example, in *Pleasant Ridge*, this

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[5] State Employees' Retirement Act ("SERA"), 1943 PA 240, MCL 38.1, et seq.

Court addressed the constitutional question whether a regulatory statute ("Act 12") that was "devoid . . . of standards or guidelines within the four corners thereof" could be constitutional. Although Act 12 did not contain any express standards or guidelines, it specifically referenced a Federal statute. The Court upheld the constitutionality of Act 12 and noted at p 243:

> If Act 12 was not what it is, namely a statute which by reference adopts or brings within its scope the provisions of another statute in order that it may become operative, invalidity thereof as charged would be apparent. Act 12 however is such a reference statue, and the Federal statute to which it refers and upon which its operational purpose is dependent sets forth a great plethora of specific standards to which all local functionaries . . .must conform . . . That is enough to meet and overcome the "no standards" argument which counsel have so forcefully presented. [Footnote omitted.]

Constitutional interpretation is based on determining the intent of the ratifiers at the time of the ratification of the Constitution.[6] At the time it was ratified, Const 1963, art 9, § 24, would have been devoid of *any meaning whatsoever* if it did not incorporate by reference the various documents (such as the SERA) describing "each pension plan and retirement system of the state and its political subdivisions" it was intended to protect. These documents are not peripheral documents only tangentially related to the purposes of art 9, § 24—they are *the* critical documents necessary to giving art 9, § 24, any effect whatsoever.[7] Thus, the ratifiers of art 9, § 24, would have recognized that by approving it, they were approving a constitutional

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[6] "[T]he primary objective of constitutional interpretation, not dissimilar to any other exercise in judicial interpretation, is to faithfully give meaning to the intent of those who enacted the law. This Court typically discerns the common understanding of constitutional text by applying each term's plain meaning at the time of ratification. *Wayne Co. v. Hathcock*, 471 Mich 445, 468-469; 684 NW2d 765 (2004)." [*National Pride at Work, Inc v Governor*, 481 Mich 56, 67-68; 748 NW2d 524 (2008).]

[7] It is obvious that the text of the various public pension plans protected by the art 9, § 24, could not be conveniently repeated word-for-word in the Constitution itself. Just the SERA alone takes up 60 pages of print.

contractual guarantee of public pension benefits and that those benefits were described in other enactments and documents.[8]

Moreover, art 9, § 24, does not apply just to the public pension plans as they existed on January 1, 1964 (the date the 1963 Constitution took effect). Ordinarily, when a statute is incorporated by reference, it is incorporated in its then current form. Future changes to the incorporated statute are not incorporated prospectively "unless the intent therefore is express or strongly implied" in the adopting statute. *Darmstaetter v Moloney*, 45 Mich 621, 624; 8 NW 574 (1881). In addition, "[w]here . . . the adopting statute makes no reference to any particular act by its title or otherwise, but refers to the general law regulating the subject in hand, the reference will be regarded as including, not only the law in force at the date of the adopting act, but also the law in force when action is taken, or proceedings are resorted to." *Pub Schools of Battle Creek v Kennedy*, 245 Mich 585, 592; 223 NW 359 (1929).

Amici contend that art 9, § 24, incorporates by reference (1) all public pension plans as they existed on January 1, 1964, (2) all amendments to public pension plans adopted since January 1, 1964, and (3) all new public pension plans created since January 1, 1964. For example, on January 1, 1964, the SERA contained only the Tier 1 pension plan (and its tax exemption in § 41) for state employees. In 1996 PA 486, the legislature amended the SERA to create the Tier 2 plan (and its tax exemption in § 69) for new state employees hired after March 31, 1997. Although not in existence in 1964, the Tier 2 tax exemption is nonetheless now incorporated by reference into, and guaranteed by, art 9, § 24.

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[8] Interestingly, the Bursch Brief, at p 19, argues that voters were "undoubtedly aware" of article 9, § 2. How was it that the same voters were simultaneously unaware of art 9, § 24, and its purpose of guaranteeing public retirement benefits?

We note that at least one other incorporation by reference in the Michigan Constitution has been recognized. In the Civil Service provision, Const 1963, art 11, § 5, a 1978 amendment gave state police troopers and sergeants the right to "binding arbitration . . . as now provided by law for public police and fire departments." This general reference incorporates a statute, 1969 PA 312, into the Constitution by reference. OAG 1979-80, No 5499, p 153 (June 11, 1979).

For these reasons, amici contend that the text of "each pension plan and retirement system of the state and its political subdivisions" in effect on and after January 1, 1964, are incorporated by reference into Const 1963, art 9, § 24. Therefore, amici submit that the argument in the Bursch Brief, that public pension tax exemptions do not appear in the Constitution, is incorrect.

2. Intention of Ratifiers

The Bursch Brief, at pp 22-24, argues that the ratifiers of the 1963 Constitution did not intend to create a permanent tax exemption for public pensions in art 9, § 24. Amici submit that the constitutional and statutory scheme command otherwise.

As we argue in the section above, art 9, § 24, incorporates by reference the documents (such as the SERA) that create public pensions. Any person contemplating art 9, § 24, would have recognized that art 9, § 24, has meaning only if those public pension enactments are incorporated by reference. In 1963, there were four statutory public pension plans[9] that

[9] The four retirement statutes in effect on January 1, 1964, that contained their own state tax exemptions were the SERA, the Public School Employees Retirement Act, 1980 PA 300, the Legislative Retirement System Act, 1957 PA 261, and the city library employees' retirement system act, 1927 PA 339.

expressly provided for a public pension tax exemption. As amici argued previously,[10] these tax exemptions were (and are) integral components of the "accrued financial benefits" guaranteed by art 9, § 24. Thus, the ratifiers would have understood that art 9, § 24, provides a guaranteed tax exemption for whatever public pension benefits had accrued as of January 1, 1964 or would accrue in the future.

The Bursch Brief, at pp 23-24, makes much of the fact that there is no evidence in the constitutional convention documents discussing the public pension tax exemptions. This is neither surprising nor fatal to amici's position. There is also no evidence that the constitutional convention discussed *any of the detailed provisions* of any public pension plan that the convention proposed converting into a contractual guarantee. There was, for example, no discussion of the provisions in the SERA for computing pension eligibility, final average compensation, years of service, the pension factor, survivor options, or the pension tax exemption. Thus, the absence of any discussion about one particular detail, the tax exemption, is inconsequential to the common understanding of the constitutional text as written. What is important is that the ratifiers would have understood that art 9, § 24, was going to protect the "accrued financial benefits" of all public pension plans, existing now or in the future, irrespective of their details. Since state tax exemptions were a part of the "accrued financial benefits" and were clearly set forth in the documents and enactments incorporated by reference into art 9, § 24, the tax exemptions are protected.

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[10] Amicus Brief, pp 22-25.

3. Case Law from Other States

The Bursch Brief cites a variety of cases from other states[11] and argues, at p 29, that these other "state courts, confronted with this identical issue, have held that lifting of a statutory exemption for public-pension distributions did not violate the Contract Clause." Amici submit that these courts did not confront the identical issue and that these decisions, even the ones helpful to amici, are not relevant to this Court's resolution under Const 1963, art 9, § 24.

None of the foreign cases cited involved a state *constitutional* provision such as art 9, § 24, that contractually guarantees pension tax exemptions. The cited cases only concerned *legislative* tax exemptions. The Bursch Brief cites these cases because it argues that the tax exemptions, such as the tax exemptions in the SERA, should be treated as legislative acts, not constitutional provisions. Thereby, the Bursch Brief generally ignores art 9, § 24, and assumes that art 9, § 2, stands in a superior position and bans any permanent statutory tax exemption. It is a fundamental error of the Bursch Brief to assume that art 9, § 2, controls the operation of art 9, § 24. "Because fundamental constitutional provisions are of equal dignity, none must be so construed as to nullify or substantially impair another." *In re Probert*, 411 Mich 210, n 17 p 234; 308 NW2d 773 (1981), quoting *People v Blachura*, 390 Mich 326, 333; 212 NW2d 182 (1973).

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[11] Tax exemption disallowed: *Herrick v Lindley*, 391 NE2d 729 (Ohio 1979); *Blair v State Tax Assessor*, 485 A2d 957 (Me 1984); *Parrish v Employees' Retirement System of GA*, 398 SE2d 353 (GA 1990); *Spradling v Colo Dep't of Revenue*, 870 P2d 521 (Colo App 1993); *Sheehy v Public Employees Retirement Div*, 864 P2d 762 (Mont 1963).

Tax exemption upheld: *Hughes v Oregon*, 838 P2d 1018 (Or 1992); *Baily v North Carolina*, 500 SE2d 54 (NC 1998).

Art 9, § 24, must first be evaluated on its own merits. The Bursch Brief recognizes that permanent tax exemptions in other sections of the Constitution[12] are not prohibited by art 9, § 2. If, as amici contend, the public pension tax exemptions are incorporated into art 9, § 24, then there is no legal justification to apply art 9, § 2, to those tax exemptions.

Art 9, § 2, is relevant only to the extent that it has the power to ban the tax exemptions incorporated into art 9, § 24. Even if one accepts the Bursch Brief argument that art 9, § 2, somehow conflicts with art 9, § 24, the rules of constitutional construction would affirm that the public pension tax exemptions in art 9, § 24, prevail over any prohibition in art 9, § 2. *See* Amicus Brief, pp 29-30.

If these two constitutional provisions are in conflict, the cases cited by the Bursch Brief are simply irrelevant as none address a conflict between two constitutional provisions.

4. Legislative Authority

An essential argument in the Bursch Brief is that the legislature possesses the power to override the constitutional promise of Const 1963, art 9, §24. This type of legislative behavior was discussed in *US v Winstar Corp*, 518 US 839; 116 SCt 2432; 135 L Ed 2d 964 (1996). In *Winstar*, the US Supreme Court held that the United States was contractually obligated to afford promised favorable regulatory treatment and, when the Congress discontinued that favorable treatment, it breached the contract:

> [Plaintiffs] claim is that the Government quite plainly *promised* to regulate them in a particular fashion, into the future. They say that the very *subject matter* of these agreements, an essential part of the *quid pro quo*, was Government regulation; unless the Government is bound as *to that regulation*,

[12] Const 1963, art 9, § 4, and art 9, § 8.

> an aspect of the transactions that reasonably must be viewed as a *sine qua non* of their assent becomes illusory. I think they are correct. If, as the dissent believes, the Government committed only "to provide [certain] treatment unless and until there is subsequent action," post, at 935, then the Government in effect said "we promise to regulate in this fashion for as long as we choose to regulate in this fashion" which is an absolutely classic description of an illusory promise. . . . In these circumstances, it is unmistakably clear that the promise to accord favorable regulatory treatment must be understood as (unsurprisingly) a *promise* to accord favorable regulatory treatment. [*Winstar*, at 921, Scalia, J, concurring, emphasis in original.]

Justice Scalia's logic applies to the circumstances of state employees retired under the SERA. It should be unmistakable clear that a promise, made by the people in Const 1963, art 9, § 24, to accord favorable tax treatment to public employees in retirement must be understood (unsurprisingly) as a *promise* to afford favorable tax treatment in retirement.

Amici ask this Court to reject the arguments in the Bursch Brief that would permit the legislature to break the state's constitutional contract with its public employees and retirees.

Respectfully Submitted

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